No. 460

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

THE FALK CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE FALK CORPORATION.

LEON B. LAMFROM,
A. J. ENGELHARD,
Counsel for Respondent,
The Falk Corporation.

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OPINIONS BELOW.

The first opinion of the Circuit Court of Appeals for e Seventh Circuit (R. 1198-1206) is reported in 102 F. d) 383, and the second opinion (R. 1208-1212) is reported 106 F. (2d) 454.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered ly 13, 1939. No stay of the decree, or any part thereof, s asked by the petitioner. The petition for a writ of

certiorari was filed October 12, 1939, and was granted November 13, 1939. The petitioner has invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are set forth in the Appendix.

QUESTIONS PRESENTED.

1. Whether the Circuit Court of Appeals exceeded the jurisdiction granted by Section 10 (e) in adding to the unfair labor practice order of the Board, the explanatory language objected to by the Board.

2. Whether the Circuit Court of Appeals, if it should be determined that the decree invalidated or modified the direction of election, had jurisdiction so to do under Section 9 (d) of the Act.

3. Whether the Board has the power in enforcing Section 8 of the Act to divest employees of the rights guaranteed to them under Section 7 of the Act.

STATEMENT OF THE CASE.

On May 28, 1937 (R. 19), there was received in the Regional Office of the National Labor Relations Board for the Twelfth District, a charge (R. 18-19) of unfair labor practices against the respondent, which was filed by the Amalgamated Association of Iron, Steel and Tin Workers

of North America, Lodge No. 1528 (hereinafter called the Amalgamated or C. I. O.), a labor organization.

The charge accused the respondent of engaging in unfair labor practices within the meaning of Section 8, Subsections (1), (2) and (3) of the National Laor Relations Act (hereinafter called the Act).

On June 8, 1937, the Regional Director requested the respondent to have no further dealings with the local union known as The Independent Union of Falk Employees, pending the outcome of the hearing (R. 89, 1044) to be held on the charges filed. To this the respondent agreed (R. 1045) (R. 1071). This agreement the respondent has fully kept in all respects (R. 89).

On August 2, 1937, the Amalgamated filed amended charges (R. 20-21), and, among other things, included, in addition to the charges contained in the original charge, an accusation that the respondent had refused to bargain collectively with the Amalgamated, in violation of Subsection (5) of Section 8.

On the same day, the Amalgamated filed a "Petition for Investigation and Certification of Representatives" (R. 13-14) under Section 9 (c) of the Act.

On August 4, 1937, the Regional Director for the Twelfth Region issued the unfair labor practice complaint (R. 20-21) based upon the amended charges filed on August 2, 1937.

The respondent duly interposed its answer (R. 21-25) to the unfair labor practice complaint.

Thereafter, the Board ordered the unfair labor practice proceeding against the respondent under Section 10 and the representation proceeding under Section 9 (c) to be consolidated for the purpose of hearing (Board's Exhibit 2, not printed but on file with the Clerk).

At the opening of the hearing, The Independent Union of Falk Employees was permitted to intervene (R. 29).

At the opening of the hearing, the complaint case, known as Board's case No. XII-C-57, and the representation case, known as Board's case No. XII-R-85, were considered as one proceeding, based upon the petition and charges filed by the Amalgamated (R. 28).

The consolidated hearing was held from August 16th to August 25th, 1937 (R. 2).

In addition to the Board, the respondent, and The Independent Union of Falk Employees, The International Union of Operating Engineers, Local 311, participated in the hearing, by counsel (R. 26).

The petition for intervention of The International Union of Operating Engineers, Local 311, however, was subsequently dismissed by the Board (R. 1168).

On November 2, 1937, the Trial Examiner filed his Intermediate Report in both cases (R. 1136-1152).

On April 18, 1938, the Board made its decision, order and direction of election (R. 1165-1182).

On June 30, 1938, the Board filed its petition (R. 1-5) for enforcement of its order in the Circuit Court of Appeals. In its petition, the Board asks "for the enforcement of a certain order issued by the Board in a proceeding by it against the respondent, The Falk Corporation." The Board then describes the proceeding as shown upon its record as cases No. R. 278 and No. C. 293, being respectively the representation case and the unfair labor practice case, and states that the title of the one proceeding involving both cases is "In the Matter of The Falk Corporation and the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 1528 (R. 1). It then proceeds to state in its petition that both cases were consolidated for purpose of hearing (R. 2), and that the right to intervene was granted The Independent Union of Falk Employees (R. 2). It further states in its petition that the consolidated

hearings in both cases were held between August 16th and August 25th, 1937 (R. 2).

It further states in its petition (R. 3) that on April 18, 1938, the Board stated its Findings of Fact and Conclusions of Law, and made its decision, order and direction of election in said *proceeding*.

Among other provisions of the order of the Board for which it sought enforcement was the provision:

> "3. The complaint is hereby dismissed * * * (2) insofar as it alleges that the respondent has engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act." (R. 4)

In the last two paragraphs of its petition for enforcement, the Board states that, pursuant to *Sections 10 (e) and 9 (d)* of the Act, it is certifying and filing with the Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, order and direction of election of the Board (R. 4); and, requested the Court to "take jurisdiction *of the proceedings* and *of the questions* determined therein, and make and enter upon the *pleadings, testimony and evidence* and the *proceedings set forth in the transcript* and upon the order made thereupon, a decree enforcing in whole said order of the Board and require respondent and its officers, agents, successors and assigns to comply therewith" (R. 5). (italics supplied)

The respondent, on July 19, 1938, filed its answer (R. 6) with the Circuit Court of Appeals, in which, among other things, it alleged that the Board's order of April 18, 1938, was and is contrary to law, for the reason that the Board's conclusions of law, upon which the order was based, are erroneous.

On August 31, 1938, The Independent Union of Falk Employees filed its petition for intervention in the pro-

ceedings pending in the Circuit Court of Appeals (R. 1194), which petition, among other things, stated that the Independent "has not been made a party to the proceeding before the above-named Court, to enforce the Order of the National Labor Relations Board"; "That substantial rights of the Independent Union of Falk Employees will be affected by the Order of this Court enforcing the said Order of the National Labor Relations Board"; "That it is necessary that the Independent Union of Falk Employees be permitted to intervene, to assure a full and complete hearing of said petition filed by the Board, and for the further reason that the National Labor Relations Board seeks to deny to *the members* of said Independent Union of Falk Employees rights guaranteed to them by the National Labor Relations Act" (R. 1196) (italics supplied).

It concluded its petition with a prayer "that this Court make an order granting it leave to intervene herein, as a party, and for such other and further relief as to this Court seems just" (R. 1196-1197).

On October 1, 1938, the Circuit Court of Appeals ordered that The Independent Union of Falk Employees "be, and they are hereby granted leave to intervene in this cause" (R. 1197).

On March 7, 1939, the lower Court filed its decision (R. 1198-1206) (102 F. (2d) 383).

In its decision (R. 1206) and at page 390 of the official report (102 F. 2d), the Court said:

> "It is hardly necessary for us to observe that our opinion is not to be construed as denying to the employee the right to organize or join an independent union as readily as an organized union. The employees must be perfectly free at all times, and this means *in the future*, to select the union they prefer."

On March 7, 1939, the lower Court entered an order granting the enforcement of the Board's order of April 18, 1938 (R. 1207).

On May 23, 1939, the lower Court held a hearing on the form of decree to be entered (R. 1207-1208). At that time, leave was granted the Board to file, within five days, additional suggestions and for the respondent to file, within five days thereafter, a reply thereto (R. 1208).

On July 13, 1939, the lower Court filed its opinion in the matter entitled "On Objections of the Board to the Entry of the Final Decree as drafted by the Board" (R. 1208-1212) (106 F. (2d) 454).

On the same day, there was entered of record the final decree (R. 1212-1214).

The provisions of the Board's order (R. 1180-1181), and the provisions of the final decree of the Court (R. 1212-1214), when juxtaposed, show in what respect the Court modified the Board's order, and, as so modified, decree enforcement thereof.

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board	
hereby orders that the respondent, The Falk Corporation, and its officials, agents, successors, and assign shall:	It is hereby ordered that the Falk Corporation, respondent herein,
1. Cease and desist:	Cease and desist from
(a) From dominating or interfering with the formation or administration of the Independent Union of Falk Employees, or any other	(a) dominating or interfering with the formation or administration of the Independent Union of Falk Employees or of any other labor organi-

labor organization of its employees, and from contributing support to the Independent Union of Falk Employees or to any other labor organization of its employees;

zation of its employees and from contributing financial or other support to said Independent Union or any other labor organization;

(b) From in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

(b) from interfering with, intimidating, restraining, coercing, or endeavoring to coerce, its employees in their right to form, join, or assist, any labor organization or in exercising their right to freely and collectively bargain through representatives of their own choosing, or to freely engage in concerted activities for the purposes of collective bargaining.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

It is further ordered that said respondent

(a) Withdraw all recognition from the Independent Union of Falk Employees as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment,

withdraw recognition of the Independent Union as the representative of all or any of its employees for the purpose of dealing with it, the respondent, concerning grievances, labor disputes, wages, or rates of pay, hours of employment, and other conditions of employment of labor; **provided, however, that the said employees shall remain free to choose at the coming election, or any future election**

held or conducted pursuant to the provisions of the National Labor Relations Act, the Independent Union to represent them in labor relations dealings with respondent; and provided further, however, that the said employees be uninfluenced or coerced in said election by the said respondent and that the said respondent refrain from exercising any influence or coercion over the employees in their selection of said Independent Union (bold supplied).

and completely disestablish the Independent Union of Falk Employees as such representative;

It is further ordered that respondent shall

(b) Immediately post notices in conspicuous places throughout its Milwaukee plant and maintain such notices for a period of thirty (30) consecutive days stating

(1) that the respondent will cease and desist in the manner aforesaid, and

post notices in conspicuous places throughout its Milwaukee plant and maintain such notices for a period of thirty consecutive days stating

(2) that it has withdrawn all recognition from the Independent Union of Falk Employees as the representative of its employees for

that the respondent will and does withdraw recognition of the Independent Union of Falk Employees as representative of its employees for the purpose

the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment

and that it has completely disestablished said organization as such representative;

of dealing with the respondent concerning grievances, labor disputes, wages or rates of pay, hours of employment and other conditions of employment, and that it has, and does, completely disestablish such labor organization as such representative,

and that it will not recognize it until and unless its said employees freely and of their own choice select the Independent Union as their representative to so deal with said respondent concerning said labor disputes.

It is further ordered that the respondent

(c) Notify the Regional Director for the Twelfth Region in writing within 10 days from the date of this Order what steps it has taken to comply herewith.

notify the Regional Director for the Twelfth Region in writing what steps it has taken to comply with this order, within forty days from the date of this order or in case application is made to the United States Supreme Court for a writ of certiorari, within thirty days from the date the Supreme Court affirms the decree or denies the writ, if it takes either action.

It is further ordered

that this court, by this order, is not approving nor is it disapproving the direction of the National Labor Relations Board in reference to a coming or possible election by em-

> ployees to choose their bargaining agency, and this order is not to be construed as approving any future action which does not place upon the ballot the names of all labor agencies or unions which are seeking the votes of the employees to represent them in collective bargaining with respondent over labor disputes, wages, etc. (bold supplied).

INACCURACIES CONTAINED IN PETITIONER'S BRIEF IN ITS STATEMENT OF THE CASE.

On page 5 of petitioner's brief, counsel for the petitioner state that they will make a brief summary of the Board's findings of fact. Certain of the summarized findings of fact contained in the petitioner's brief are misleading; others are highly colored; other are inaccurate. We respectfully refer the Court to the findings of fact of the Board as they are set forth on pages 1170 to 1175 of the transcript, to which pages petitioner's counsel have referred in stating the summary of the facts found by the Board in its decision of April 18, 1938. Fearing, however, that our silence may be construed as assent to the correctness of some of the more glaring inaccuracies, we comment on those which tend to give the respondent's activities a color not given, or intended to be given by the Board's actual findings.

On page 6 of petitioner's brief, it is stated:

> "Harold Falk clearly indicated to the representatives that they were expected to form a new unaffiliated organization."

But, the Board found (R. 1171):

"On April 8, 1937, the Works Council held its last meeting at which meeting Harold Falk was present. There is testimony that he told the employees that they could form an independent union and that they could meet on the respondent's property to make arrangements for forming it, but that they would have to meet off the respondent's property after it was formed."

On page 6 of petitioner's brief, it is stated:

"A number of the representatives on the company-dominated Works Council proceeded to form the Independent, thus carrying out Falk's desire that they form a new inside organization."

But, the Board made no such finding. The Board found (R. 1172):

"On April 12, 13, and 14, 1937, a group of past and present Employee Representatives on the Works Council held four meetings in the basement of the plant hospital during working hours and discussed the formation of an inside union."

The Board did not find that those meetings were held to "carry out Falk's desire that they form a new inside organization."

On pages 6 and 7 of petitioner's brief, it is stated:

"Respondent's personnel manager delivered notices of the first meeting, held on April 12; he regarded this function as 'business connected with the company.'"

The Board found (R. 1172):

"Hydar, the personnel manager of the respondent, was instrumental in notifying employees of the meeting held on April 12. He did not remember who had asked him to notify these employees, but was certain that the person who had made the request was an employee."

The Board made no finding that Hydar regarded this function as "business connected with the company."

Counsel's statement in footnote No. 6, on page 7, illustrates the failure of counsel to stay within the record of the findings made by the Board. The Board made no finding based upon the testimony referred to in footnote No. 6.

On page 7 of petitioner's brief, it is stated:

> "The meeting was held on company property during working hours and those who attended were paid by respondent for the time spent at this meeting, as well as at later meetings."

The Board did find (R. 1172) that four meetings were held on respondent's premises during working hours, but the Board made no finding regarding payment for time spent at the meetings. Nowhere in its findings does it refer to that transaction, apparently because the Board accepted the explanation that payment was made due to routine practice, and that when the fact of payment came to the attention of respondent's management, the payments were subsequently deducted (R. 929-930). The incorporation of the wholly gratuitous statement in footnote No. 7 as a finding of the Board is unjustified. Counsel for the Board thus attempt to amend the findings of the Board and bring to the attention of this Court matters wholly disregarded by the Board itself.

On page 7 of petitioner's brief, it is stated:

> "Falk had previously announced, at the meeting where the dissolution of the Works Council was proclaimed to the representatives, that there would be a general wage increase on June 1 *if no outside union intervened.*" (Italics supplied)

The Board made no finding comparable with the latter part of the quoted statement. The Board found (R. 1171):

"He (Falk) also admitted that at that meeting he had told the men that a raise which had been agreed on between the respondent and the Works Council to become effective June 1, 1937, would stand as long as the Works Council stood, but that, if another group came into being, the arrangements would be cancelled and new negotiations would have to be entered into with the new group."

On page 8 of petitioner's brief, it is stated:

"The details of organization of the Independent were likewise arranged under respondent's supervision."

No such finding was made by the Board. The Board found (R. 1172):

"On April 13, the men again sent for Harold Falk. He was not in the plant, but his son, Richard, addressed the meeting as did Connell, a vice president of the respondent. Connell told the men that his interpretation of the Wagner Act was that the respondent could not help the men either financially or in an advisory capacity. The meeting was then adjourned."

On page 8 of petitioner's brief, it is stated:

"Responsible officials of respondent addressed a meeting at which the details were considered and gave plentiful advice."

The Board made no finding in that respect, except the finding (R. 1172):

"Harold Falk was called into the meeting on April 12. He testified that he gave his impressions of the Wagner Act to the men as 'near as he could.'"

and the finding, as has been previously indicated, with regard to Connell.

On page 8 of petitioner's brief, it is stated:

"Falk urged haste in formation of the new organization and insisted that it be incorporated."

No such finding was made by the Board. The Board did say, as a recital, but not as a finding (R. 1172):

> "There is also evidence that he (Falk) told the men that they would have to incorporate as quickly as possible because the C. I. O. was working in the plant, which statement was denied by Falk. *At any rate,* the men held another meeting at which it was decided to secure the services of an attorney." (Italics supplied)

The Board plainly indicated by the expression "at any rate" that it would not state whether Falk made the statement or did not. The Board suspended its decision on that point, being satisfied that it need not adopt either version of the testimony.

On page 8 of petitioner's brief, it is stated:

> "Under the guidance of this attorney, the Independent was incorporated in accordance with Falk's demand, although incorporation had been rejected both by the committee of organizers and by the rank and file at the first organizational meeting."

No such finding was made by the Board (R. 1173):

> "When the meeting had been adjourned, three employees, who had attended it, discussed incorporation of the Independent with the attorney. They were joined by another employee, who said that, if he could get two other signers, he would go to the attorney's office next day and sign articles of incorporation. One of those present admitted, at the hearing, that the reason the Independent is a corporation today is because of 'a little intimate talk' between three employees and the attorney."

The Board found further (R. 1174):

> "The next day, April 19, 1937, the three employees, who had attended the meeting on the previous day, went to Burke's (the attorney) office and signed the articles of incorporation, although they had not been given authority to do so."

Nowhere did the Board make a finding that anything was done with regard to the incorporation of the Independent because of any demand by Falk.

The strongest language used by the Board is found in its argumentative summary (R. 1176), where it said:

> "With the form of the Independent perfected in accordance with its desires, the respondent recognized it as the bargaining agent for all its employees on the mere statement of its incorporators that it represented a majority of such employees, without requiring any other proof of a majority."

On page 9 of petitioner's brief, it is stated:

> "However, respondent set out to build up a majority for the Independent by a campaign of coercion directed against the two 'outside' unions and in favor of the Independent. On Company time and property high supervisory employees bitterly disparaged the Amalgamated and compared it unfavorably with the Independent; at least one even openly solicited on behalf of the Independent."

The above quotation is an excellent example of overzealousness on the part of petitioner's counsel. They misquote and garble the Board's findings of fact.

The Board found (R. 1174):

> "During March, April, and May 1937, both the Amalgamated and the Independent conducted an intensive campaign for members, at times doing so during working hours. Some of the foremen, in discussions with the men, expressed their hostility to the C. I. O. and told them that an inside union would be better for them. At the hearing, the foremen testified that the management had ordered them not to express opinions on the subject, but admitted that they had expressed their opinions in 'friendly' talks with the men."

On page 9 of petitioner's brief, it is stated:

"And, Falk, through a series of grossly coercive interviews with the powerhouse employees, effectively destroyed the majority there claimed by the Operating Engineers."

The Board found (R. 1174):

"After the conference he (Falk) interviewed the men individually to ascertain how many desired to be represented by the Operating Engineers. At the hearing Falk testified that he may have expressed an opinion unfavorable to the Operating Engineers, when talking to the men at that time."

The Board found further relative to Falk's interviews with the powerhouse employees (R. 1175):

"On April 28, 1937, counsel for the Operating Engineers accused Falk of coercing these employees. After this accusation, Falk called the powerhouse employees to his office individually to find out whether or not they had been intimidated by his former conversation with them. Although several of the powerhouse employees assured Falk in these individual conversations and later testified at the hearing that they were not intimidated by the conversations or letter, it is significant that no one appeared at the next meeting of the Operating Engineers held on April 18, 1937. Letters of withdrawal, which were prepared in the office of the attorneys for the Independent, were subsequently received about May 6, 1937, by the Operating Engineers from five of the engineers."

The footnote on page 9 of petitioner's brief is not a finding of fact, but is purely an argumentative conclusion by counsel.

On page 10 of petitioner's brief, counsel state:

"Having caused the Independent to be established, respondent led the employees, by bribes, threats, and illegal use of the powerful weapon of

> recognition, away from the *bona fide* labor unions and into the Independent."

The language is a distortion of the truth. There is not a scintilla of evidence in the entire record of bribes being offered by the respondent to anyone. We challenge counsel to produce one instance of bribery. Nor is there any evidence of threats. The Board made no finding of bribery or of threats, and for counsel to make such a statement, without any evidence to support it, much less state that the Board found that there was bribery and there were threats, when, in fact, the Board made no such finding, is a gratuitous insult to the managerial forces of respondent.

The lower Court, after reviewing (R. 1201-1204) the alleged acts by the respondent's managerial forces as indicative of an intent to prevent the free exercise of the employees' right to organize for collective bargaining, stated (R. 1204):

> "We are satisfied that some of these charges were explained satisfactorily by the respondent. Others, standing alone, afford no support for the Board conclusions, if true. * * *
>
> "* * * we can see nothing to criticize in Mr. Falk's action expressing a preference for a local over an outside union. Especially is this true, where the employee asks the employer for advice. There is much evidence in this record which is indicative of a very wholesome cooperative spirit existing between management and employees. Surely, it is desirable and bespeaks the confidence of employees in the management to have the old employees ask the executive officers of the employer to express his views and his labor union preference."

Counsel for the Board will concede that the respondent posted the following notice in conspicuous places throughout its Milwaukee plant, on August 14, 1939, and maintained such notices for a period of thirty (30) consecutive days:

"*THE FALK CORPORATION*
HEREBY GIVES NOTICE

(1) That *THE FALK CORPORATION* will and does withdraw recognition of *THE INDEPENDENT UNION OF FALK EMPLOYEES* as the representative of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages or rates of pay, hours of employment, and other conditions of employment; and,

(2) That *THE FALK CORPORATION* has and does completely disestablish *THE INDEPENDENT UNION OF FALK EMPLOYEES* as such representative; and,

(3) That *THE FALK CORPORATION* will not recognize *THE INDEPENDENT UNION OF FALK EMPLOYEES* until and unless the employees of *THE FALK CORPORATION* freely and of their own choice select *THE INDEPENDENT UNION OF FALK EMPLOYEES* as their representative to so deal with *THE FALK CORPORATION* concerning grievances, labor disputes, wages or rates of pay, hours of employment, and other conditions of employment.

THE FALK CORPORATION

Harold S. Falk—Vice Pres.—Wks. Mgr.

August 12, 1939."

Counsel for the Board will likewise concede that the Regional Director for the Twelfth Region was notified, in writing, by the respondent of the steps it had taken to comply with the final decree, and that such notification was made within forty (40) days from the date of the order; said notification being as follows:

"August 15, 1939

Mr. John G. Shott,
Regional Director, Twelfth Region,
National Labor Relations Board,
623 North Second Street,
Milwaukee, Wisconsin.

Re: National Labor Relations Board, petitioner, vs. The Falk Corporation, respondent—U. S. Circuit Court of Appeals, Seventh Circuit. No. 6707. October Term, 1938. April Session, 1939.

Dear Sir:

As attorneys for The Falk Corporation, respondent in the above entitled cause, we wish to notify you, on behalf of The Falk Corporation, that The Falk Corporation has taken the following steps to comply with the order of the court dated July 13, 1939.

On August 11, 1939, we, as attorneys for The Falk Corporation, by registered mail, return receipt requested, sent to Alexander, Burke & Clark, attorneys for The Independent Union of Falk Employees, a letter together with a copy of the notice of The Falk Corporation dated August 12, 1939, copies of which letter together with the attached notice are herewith enclosed.

On August 14, 1939, the said notice was posted on the official bulletin board of The Falk Corporation, and each of the following named departments of The Falk Corporation, and will continue to remain posted for a period of at least thirty days from August 14, 1939:

1. General Office
2. Drafting Room
3. Welding Department
4. Pattern Shop
5. Power House
6. Assembly Shop
7. Foundry
8. Machine Shop

We are thus notifying you, on behalf of The Falk Corporation, in accordance with said order of the court of July 13, 1939.

Respectfully yours,

LAMFROM, TIGHE, ENGELHARD & PECK,

By LEON B. LAMFROM,

Attorneys for The Falk Corporation, respondent.

LBL:T
Enc.
Registered
Ret. Rec. Req."

Counsel for the Board will likewise concede that the petitioner did not apply to the Circuit Court of Appeals or to this Court for an order staying the posting of the notices required by the final decree.

ARGUMENT

I.

A.

The Circuit Court of Appeals had Jurisdiction to Modify the Unfair Labor Practice Order of the Board, Because of the Provisions of Section 10 (e) of the Act.

The lower court entered a form of decree by the terms of which the provisions of the Board's order are substantially enforced (*supra*, pp. 7-10). The lower court, however, added to the order of the Board explanatory provisions which we do not consider to be a modification of the Board's order in any respect, but were for the sole and only purpose of protecting, on the one hand, the rights of the respondent's employees, which are guaranteed by Section 7 of the Act, and, on the other hand, to delimit to the respondent the re-

spondent's obligations under the provisions of the decree, which were in harmony with the provisions of the Board's order. The Board had ordered, among other things, that the respondent take affirmative action, namely, to withdraw all recognition from the Independent Union of Falk employees as a representative of any of its employees for the purpose of dealing with the respondent, concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment; and completely disestablish the Independent Union of Falk employees as such representative. Furthermore, the Board's order required of the respondent that it post notices in conspicuous places throughout its Milwaukee plant, and maintain such notices for a period of thirty consecutive days, stating, among other things, that it has withdrawn all recognition from the Independent Union of Falk employees as a representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment; and, that it has completely disestablished said organization as said representative.

When the entire record came before the Circuit Court of Appeals for the purpose of having that court enforce the order of the Board, Section 10 (e) provided that court has exclusive jurisdiction. In exercising its exclusive jurisdiction, Section 10 (e) provides that the court "shall have jurisdiction of the *proceeding* and of the *question determined therein* • • • and to make an enter upon the pleadings, testimony, and proceedings set forth in such transcript, a decree enforcing, *modifying, and enforcing as so modified,* or setting aside, in whole or in part, *the order of the Board*" (italics supplied).

It was apparent to the lower court, upon the argument and hearing in connection with the court's proposed final decree, that the Board interpreted the provision for dises-

tablishment of the Independent Union as the equivalent of its complete disablement, for all times, to act as the collective bargaining agency of the respondent's employees, even after all domination by the respondent had ceased. The lower court, therefore, was confronted with "the question determined" whether in putting the respondent under the restraint of an injunction, the provisions of such injunction would inform the respondent as to its duties in the future, the immediate future or the distant future, and whether, such restraint put upon the respondent, with the interpretation given to the word "disestablishment" that the Labor Board contended for, would destroy the rights of the members of the Independent to exercise freely their choice of a bargaining agent. The lower court, therefore, concluded to make a final decree which would protect, in the first instance, the rights of the employees to choose the Independent after it had been purged of all unlawful influence of the respondent, and, in the second instance, in specific language, made it known to the respondent that if and when the Independent Union had been chosen the collective bargaining agent of the respondent's employees, that then the respondent could not, because of the injunctional provisions of the final decree, refuse to recognize the Independent as the lawful collective bargaining agent of its employees.

The effect of the provision of the final decree, which the petitioner claims modified its direction of election, was the withdrawal of all recognition from the Independent as a collective bargaining representative of all or any of the respondent employees, and the disestablishment of the Independent as a collective bargaining agency, until such time, as the Independent might be chosen in an election held under the auspices of the Board; but, with the *condition precedent*, for the validity of such an election, that the employees be uninfluenced and not coerced in the elec-

tion by the respondent, and, that the respondent refrain from exercising any influence or coercion over the employees in their selection of the Independent Union.

The lower court, therefore, took literally the suggestion of the Board (R. 1179) that "we shall direct such election to be held upon our further order after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order." In order to completely satisfy the Board's desire in the matter, and not to go counter to the Board's wishes in the matter, the court made it a condition precedent to a valid selection of the Independent as a collective bargaining agent in any election to be held in the future, that the employees be uninfluenced and not coerced in their choice of a collective bargaining agency, and put the respondent under an injunction restraining all interference.

The court surely had the discretion, sitting as a court of equity, and pursuant to the jurisdiction conferred upon it by Section 10 (e), to modify the order of the Board. In the light of the restraint by injunction it placed upon the respondent from the date of the entry of its order, that is to say, from the date of the entry of its final decree, the positive duty to refrain from all acts of influence or coercion over its employees had the positive effect that if the respondent failed to obey the injunction of the court, it would be subject to fine, and the responsible officer would be subject to fine or imprisonment. The court had the right to assume that the injunctional restraints placed upon the respondent and its managerial officers would have the necessary result that no further influence or coercion or restraint would be directed against the employees in violation of the provisions of the Act. If that assumption by the court is given weight, then it must follow that in any future election the choice of the employees of a collective bargaining

agent must necessarily be uninfluenced and uncoerced and unrestrained by any act on the part of the respondent. The next result is inevitable, namely, that if the employees should choose the Independent, they would, in making such choice, be exercising the freedom the Act seeks to protect without interference with that freedom by either the employer, the court or the Board.

Congress gave to the Circuit Court of Appeals the power to modify the orders of the Board. It did so advisedly, and, in doing so, it bound the court as to one matter only, namely, it limited the court to the facts which the Board found, in that it provided, that "the findings of the Board as to facts, if supported by evidence, shall be conclusive" (Section 10 (e)).

Had Congress not intended to confer upon the court the power to modify the orders of the Board so that complete justice be done to all parties affected, either directly or indirectly by the orders of the Board, it would not have granted the power to the court of "modifying and enforcing as so modified" the order of the Board.

B.

If the Jurisdiction of the Lower Court to Modify the Board's Order is not to be Found in Subsection 10 e) then that Jurisdiction to Modify the Order of the Board Insofar as it Affects the Question of Whether the Independent shall be on the Ballot, if and When There is an Election, can be Found by Combining the Provisions of Section 10 (e) with the Provisions of Section 9 (d).

Section 9 (d) of the Act is as follows:

"Whenever an order of the Board made pursuant to Section 10 (c) is based, in whole or in part, upon *facts certified following an investigation* pursuant to Subsection (c) of this section, and there is a petition for the enforcement or review of *such order*,

such *certification*, and *the record of such investigation* shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside, in whole or in part, *the order* of the Board, shall be made and entered upon the pleadings, testimony and proceedings *set forth in such transcript*" (italics supplied).

The order of the Board dated April 18, 1938 (R. 1180-1181) is based in part upon facts certified following an investigation pursuant to subsection (c) of Section 9 of the Act; and, in its support of the petition for enforcement of its order (R. 1-5), the Board included the certification of facts and the record of investigation in the transcript of the entire record, filed under subsection 10(e) and 9 (a) (R. 4). The Board, therefore, conceded the interrelationship between the unfair labor practice case and the representation case. In its petition (R. 1) the Board stated that it "respectfully petitions this Honorable Court for the enforcement of a certain order issued by the Board in a proceeding by it against respondent, the Falk corporation. Said proceeding is known upon the records of the Board as cases Nos. R-278 and C-293, the title thereof being, 'In the Matter of the Falk Corporation and Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1529.'"

We shall briefly summarize the facts which show the interrelationship between the controversy set forth in the representation case and in the unfair labor practices case:

On August 2, 1937 (R. 13-14) the Amalgamated filed a "Petition for Investigation and Certification of Representatives," under Section 9 (c) of the Act.

In that petition the Amalgamated stated, in substance, that out of 1600 employees of the respondent, the petitioning Amalgamated Union represented in an appropriate unit, consisting of production employees, approximately

1400 of such production employees; that the Independent Union of Falk employees claimed to represent employees in the same bargaining unit, but that the Independent was a labor organization created in violation of Section 8 (2) of the Act (R. 13); that request is made that the Board, pursuant to Section 9 (c) investigate "such controversy" and certify to the parties the name of the representative that has been designated or selected by the respondent's employees (R. 14).

On the same day, August 2, 1937, the Amalgamated filed an amended charge (R. 21) in which, by reason of the amendment, there was added the additional charge that the respondent engaged in an unfair labor practice within the meaning of subsection 5 of Section 8 of the Act, that is, that the respondent refused to bargain collectively with the representatives of its employees, subject to the provisions of Section 9 (a) of the Act.

On August 4, 1937 (R. 20-21) the Regional Director for the Twelfth Region issued the unfair labor practices complaint based on the amended charges filed by the Amalgamated on August 2, 1937, and in reference to the violation of subsection 5 of Section 8 of the Act, the complaint alleged facts raising the identical questions of fact, which were to be investigated and certified in the representation proceeding commenced by the filing of the "Petition for Investigation and Certification of Representatives," filed on August 2, 1937, by the Amalgamated.

In Paragraph 4 (R. 15), the complaint stated, in substance, that the production employees were an appropriate unit; in paragraph 5 (R. 16) it is stated that the Amalgamated has been designated by a majority of the production employees as their representative for purposes of collective bargaining; that such designation was made by the employees signing application cards, and membership in the Amalgamated; that by virtue of Section 9-A the "Union

is and has continuously been the exclusive representative of all employees in said unit for the purpose of collective bargaining. * * *"

In Paragraph 6 of the complaint (R. 16) it is stated that respondent at various times, when requested by the union, has refused to bargain collectively with the union as exclusive bargaining agency for all of its employees in the appropriate unit, which refusal was an unfair labor practice within the meaning of Section 8, subsection 5 of the Act.

In Paragraph 10 of the complaint (R. 17) it is alleged that "By the refusal to bargain collectively" together with other acts, "and each of them" the respondent did interfere with, restrain, and coerce its employees in the exercise of their rights guaranteed in Section 7 of the Act, and has violated Section 8, subsection 2 of the Act.

In respondent's answer to the complaint (R. 21-24) issue was joined on the matter of the appropriate unit, by the denials in Paragraph 4 of the Answer, wherein it was denied that the unit described in Paragraph 4 of the complaint would insure the employees of respondent the full benefit to the right of self-organization and to collective bargaining; and denied that said unit would otherwise effectuate the policies of the Act; and denied that such unit was an appropriate unit for purposes of collective bargaining.

In Paragraph 5 of the Answer (R. 22) respondent denied that the majority of the production employees had designated the Amalgamated as their representative for purposes of collective bargaining with the respondent; denied that such designation had been made by the signing of application cards, and membership in the Amalgamated; denied that by virtue of Section 9 (a) the Amalgamated "is and has been" continuously exclusive representative of all

employees in the said unit for purposes of collective bargaining.

In Paragraph 6 of the Answer (R. 22) respondent denied that it ever was requested to recognize the Amalgamated as exclusive bargaining agency; denied it ever refused to bargain collectively with the Amalgamated as exclusive bargaining agency; denied that the employees in the said unit constitute an appropriate bargaining unit; denied that respondent had violated subsection 5 of Section 8 of the Act; and stated affirmatively "that it has and is now bargaining collectively with such collective bargaining agency which had exclusive legal right under the provisions of the National Labor Relations Act to bargain collectively."

In Paragraph 10 of the Answer (R. 24) respondent denied, among other things, "that it refused to bargain collectively with the lawfully designated representatives of its employees."

On August 4, 1937 (R. 10) the Regional Director of the Twelfth Region caused to be served upon the respondent, the Amalgamated, and the Independent Union of Falk employees, a notice of hearing (R. 9-10) to which notice there were attached a copy of the petition for investigating the controversy regarding representation, a copy of the complaint, and copies of the original and amended charges. The notice provided for a consolidated hearing of the representation controversy and the unfair labor practices complaint, to begin August 16, 1937.

The Board ordered the consolidated hearing of both proceedings (Board Exhibit No. 2, not printed but on file with the clerk).

In the decision of the Board, dated April 18, 1939, the Board makes its finding of fact (R. 1107-1178) under headings entitled, "Section I," "Section II," and "Section III."

Under "Section III," entitled, "The Unfair Labor Practices" (R. 1171), there are set forth under subsection "C" thereof (R. 1176), entitled, "C. The Refusal to Bargain Collectively," certifications of facts in the investigation conducted pursuant to subsection 9 (c), as to the appropriate unit for purposes of collective bargaining, and the facts as to the *designation* of the Amalgamated by a majority of the employees in the appropriate unit (R. 1176-1178).

The Board found (R. 1178) that there was no clear showing that the Amalgamated had been designated the collective bargaining agency by a majority of the employees within an appropriate unit at the time it sought to bargain with the respondent on May 5, 1937 (R. 1178), and because of such finding the Board found as a fact that the respondent did not refuse to bargain collectively in violation of Section 8 (5) of the Act. In its conclusions of law (R. 1179-1180) the Board held that the respondent had violated Section 8 (1) of the Act, and Sections 8 (2) of the Act, but failed to hold that it violated Section 8 (5) of the Act. In Paragraph 3 of its order (R. 1181) the Board, on the basis of the facts found in the consolidated hearing of the two cases, ordered the complaint to be dismissed "(2) insofar as it alleges that the respondent has engaged in an unfair labor practice within the meaning of Section 5 of the Act."

From the above and foregoing summary in regard to the interrelationship between the representation matter and the unfair labor practice matter, we respectfully submit that the Circuit Court of Appeals had jurisdiction under Section 9 (d) and 10 (e), to modify the order of the Board so as to provide for the Independent on the ballot, because questions of fact certified in the representation case were used as a *basis* for the Board's order. Had the Board failed to certify the appropriate unit and failed to certify the non-designation of the Amalgamated, it could not have dis-

missed the charge contained in the complaint that the respondent had refused to bargain collectively, with the Amalgamated. In the representation proceeding it was necessary for the Board to determine whether the Amalgamated had been designated by a majority of the employees in an appropriate unit; having first found that the production workers were an appropriate unit, it then proceeded to find that the Amalgamated was not designated by the majority of the employees of that unit, and, therefore, dismissed the charge of violation of Section 8 (5) of the Act in its order. Thus the order of the Board comes directly within the teeth of Section 9 (d). There was an investigation pursuant to subsection (c) of Section 9, and the facts certified following the investigation formed a basis for the order of the Board made pursuant to Section 10 (c), at least *in part*, and, therefore, when the Board petitioned the Circuit Court of Appeals for the enforcement of its order made pursuant to Section 10 (c), it included the facts certified with the record of the investigation in the transcript required to be filed under subsection 10 (e). When that was done, the Circuit Court of Appeals had jurisdiction to issue a decree enforcing, modifying or setting aside, in whole or in part, the order of the Board "upon the pleadings, testimony, and proceedings set forth in such transcript." Assuming, therefore, that the decree of the Circuit Court of Appeals modified the direction of election by its provision that the independent be on the ballot, if, and, when an election is held, support of the intent of Congress that, in the enforcement proceeding before the court, the court had jurisdiction to pass on questions of law and fact in the representation proceeding, is to be found in the report of the House of Representatives, Report No. 1147, 47th Congress, 1st Session, and on page 23 thereof, where it is stated:

> "Section 9 (d) of the bill makes it clear there is to be no court review prior to the holding of the elec-

tion, *and* provides an exclusive, complete and adequate remedy whenever an order of the Board made pursuant to Section 10 (c) is based in whole or *in part on facts certificated*, following an election, *or other investigation* pursuant to Section 9 (c). The hearing required to be held in any such investigation provides for an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under Section 10 (b) and 10 (c)."

And on page 24 of the report it is stated:

"The form and nature of the Board's order will, of course, be subject to court review, along with the other determinations and actions of the Board in the case, both as to the facts and law in the manner provided in subsection (e) or (f)."

The order of the Board, made pursuant to Section 10 (c), that is to say, made in connection with the "Complaint Proceedings" herein, is based in part upon facts certificated following an investigation pursuant to subsection (c) of Section 9. *That order is not based upon facts certified in connection with an election.* The facts certified were, in substance, that the production workers were an appropriate unit; that the Amalgamated did not have a majority of such production workers as members; and that a majority of such production workers did not designate the Amalgamated as their collective bargaining agency. Then followed the determination that the respondent had not violated Section 8 (5) of the Act by refusing to bargain collectively with the Amalgamated, and, that part of the order of the Board that the charge that Section 8, Subsection 5, was violated, be dismissed.

The lower court having before it the certification of facts resulting from the investigation, since those certificates were included in the transcript, required to be filed under subsection (e) of Section 10, and subsection (d) of Section 9, the lower court had jurisdiction by the express terms of the Act, to make an enter "upon the pleadings, testimony, and proceedings, set forth in such transcript," a decree enforcing, modifying, or setting aside in whole or in part "the order of the Board."

In its order, which the Board sought to be enforced by the lower court, the Board, in paragraph 1, and subsections (a) and (b) thereof, ordered the respondent to cease and desist from certain practices. In paragraph 2, and subsections (a), (b) and (c) thereof, the Board ordered the respondent to take certain affirmative action. In paragraph 3 (R. 1181) the Board ordered the dismissal of the unfair labor practice charged against the respondent within the meaning of Section 8 (5) of the Act in the following language:

> "The Complaint is hereby dismissed * * * (2) insofar as it alleges that the respondent has engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act."

It conclusively appears, that, in order to dismiss complaint as to the unfair labor practice charged against the respondent, within the meaning of Section 8 (5) of the Act, that part of the Board's order, dismissing the charge, was *based* upon *facts certified* following an investigation, pursuant to subsection (c) of Section 9. Those facts were certified by the Board on page 1178 of the record, when it stated:

> "There was no clear showing that the Amalgamated represented a majority of the employees within the appropriate unit at the time it sought to bargain with the respondent."

Without such certification or finding of fact, the Board could not have dismissed the charge contained in the complaint that the respondent did not violate Section 8 (5) of the Act.

The petitioner's brief, on page 23 thereof, states that:

> "In the instant case there were no 'facts certified' in the representation proceeding; there was only a direction of election to determine whether or not there should be a certification of representatives. Consequently Section 9 (d) did not grant jurisdiction to the court below as contended."

That statement is clearly erroneous, because the position of the Amalgamated, as shown in its petition, was, that it had been designated by a majority of the production workers, and that the production workers were the appropriate unit for the purpose of collective bargaining. The Board did certify, and by that we mean, find as a fact, that the production workers were an appropriate unit, and, further, that the Amalgamated had not been designated by a majority of that unit for purposes of collective bargaining. Then the board based its order for the dismissal of the unfair labor charge in the complaint as to Section 8 (5), on those two facts, *certified* after its investigation held under Section 9 (c). These facts the Board was required to certify, in order to arrive at the ultimate fact that the respondent had not failed in its duty to bargain c lectively with the Amalgamated as required by subsection 5 of Section 8 of the Act. Section 9 (c) of the Act provides:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy, and certify to the parties in writing the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing, upon due notice, either in conjunction with a proceeding under Section 10, or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

In the conduct of its hearing, for the purpose of investigating the controversy about representation, the Board did not utilize at that time "a secret ballot," but it sought to utilize another "suitable method," namely, an examination of the records of both the Amalgamated and the Independent. After having attempted to investigate by means of the records of the Amalgamated, which were refused (R. 1178), it found that the testimony of the financial secretary of the Amalgamated was insufficient proof of the fact that the Amalgamated represented a majority of the production workers, that is, in the appropriate unit (R. 1178).

Since the investigation pursuant to subsection (c) of Section 9, and the investigation of the unfair labor practice were consolidated, and the facts in both investigations were the basis of the order of the Board, then pursuant to the power lodged in the Circuit Court by subsection (e) of Section 10, namely, that the court had jurisdiction of the *proceeding*, and the *question determined therein*, the lower court had jurisdiction of any collateral matter which would interfere with the proper determination of the *question determined therein*. One *question determined* by the Board in the unfair labor practice proceeding was the matter of disestablishing the Independent for purposes of collective bargaining; and, because in addition to the transcript which covered the unfair labor practice proceeding only, the court could take into consideration, pursuant to the provisions of Section 9 (d), the facts determined in the representation proceeding, for the purpose of exercising its jurisdiction over the "question determined therein," it logically follows that the court could make such modification of the order itself, which would eventually determine not only the ultimate duties of the employer, the respondent here, but also the ultimate rights of employees with respect to their choice of a collective bargaining agency. The question before the

Board, and the question before the court, was correctly characterized by the lower court as a labor dispute. That labor dispute involved the matter of interference on the part of the employer with the selection of the bargaining agent of the employees. The ultimate final end result of any proceeding under the Act is to carry out the purposes Congress had in view in enacting the Act. That purpose is set forth in the last paragraph of Section 1 of the Act as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce, and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by *protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing* for the purpose of negotiating the terms and conditions of their employment or for their mutual aid and protection" (italics supplied).

When the lower court looked at the order of the Board and found that facts certified in the representation proceedings led in part to the order of the Board in the unfair labor practice proceedings, it saw that it had the jurisdiction to settle, once and for all, the ultimate question of when the dispute between the parties could best be finally settled without prejudice to the freedom of choice guaranteed by the Act. Having the jurisdiction, it then proceeded to exercise it under the exclusive jurisdiction granted under Section 10 (e) and proceeded to eliminate from the Board's order the limitations placed upon the employees with regard to their right, ultimately to freely choose the Independent. It restored to the members of the Independent the right to select it, at a time, and, under circumstances when, and, if, an election is held, that the respondent will be under an injunction not to interfere with or coerce their freedom of choice.

II.

The Court Did Not Modify the Withdrawal of Recognition and Disestablishment Provisions of the Board's Order.

It has heretofore been assumed by this Court that orders requiring withdrawal of recognition and disestablishment did not divest the employees of the right thereafter to choose the disestablished union as their bargaining agent in a free election held for that purpose.[1]

The Board's position in the instant case is that disestablishment and withdrawal of recognition from a union is not enough. It is here contending that a disestablished union is, or should be, under a perpetual and permanent disability and no longer eligible to represent the employees.[2]

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[1] In **Texas & N. O. R. Co. vs. Brotherhood of Ry. & S. S. Clerks,** 281 U. S. 548, this court approved an order which provided for disestablishment "until such time as these employees by a secret ballot taken in accordance with the further direction of the court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives" (p. 557).

In **N. L. R. B. vs. Fansteel Metallurgical Corp.,** 306 U. S. 240, this court, after approving of the disestablishment of Rare Metal Workers of America, Lodge No. 1, stated: **"Whether Rare Metal Workers of America, Lodge No. 1,** or any other organization, is the choice of the majority of the employees in the proper unit can be determined by proceedings open to the Board" (83 L. Ed. at p. 478) (bold supplied).

[2] In its decision, the Board, after stating that it would hold an election to determine the appropriate bargaining units for representation of the employees "after we are satisfied that the effects of respondent's unfair labor practices have been dissipated," stated: "In such election we shall make no provision for the designation of the Independent on the ballot" (R. 1179).

(This footnote continued on next page.)

The Board states that the lower court has refused to grant "full enforcement to the provisions of the Board's order * * * requiring respondent to withdraw all recognition from and completely to disestablish the company dominated Independent as a bargaining representative of the employees" (p. 29 Board's Brief). We respectfully submit that the lower court has in fact granted "full enforcement" of the said provisions *to the full extent authorized under the National Labor Relations Act.*

The lower court not only ordered the respondent to withdraw all recognition of the Independent, but also ordered the respondent to give full publicity thereto by posting notices stating that it had withdrawn all recognition of the Independent and had disestablished it as a representative of its employees (R. 1213).

When the lower court undertook the task of framing an appropriate order, it was cognizant of the fact that the Board would construe it as in effect ordering the "execution" or "blood purge" of the Independent unless such construction was negatived by appropriate language in its order.[3]

To avoid any misconstruction of the rights of the employees and respondent following the disestablishment of the Independent, in view of the publicity given to the Board's decision, the lower court merely added to its order appropriate language which would negative any assump-

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In its direction of the election the Board provided that the employees should be given the opportunity to vote only for the C. I. O. union, or the C. I. O. union or the A. F. of L. union so far as the power house was concerned (R. 1181-1182).

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[3] The court had before it the Board's decision in which the Board definitely stated that the Independent would not be permitted a place on the ballot (R. 1179).

tion that the court's order would in any way interfere with the rights vested in the employees under Section 7 of the National Labor Relations Act.

Accordingly, the lower court, in its cease and desist order, added, by way of explanation:

> "provided, however, that the said employees shall remain free to choose at the coming election or any future election held or conducted pursuant to the provisions of the National Labor Relations Act, the Independent Union to represent them in labor relations dealings with the respondent; and provided, further, however, that the said employees be not influenced or coerced in said election by the respondent and that the respondent refrain from exercising any influence or coercion over the employees in their selection of said Independent Union" (R. 1213).

Accordingly, the lower court also, in connection with that part of its order dealing with the posting of notices by the respondent, required the notice to include a statement that,

> "it (the respondent) would not recognize it (the Independent) until and unless its said employees freely and of their own choice select the Independent as their representative to so deal with said respondent concerning said labor disputes" (R. 1213).

Because the lower court added the language hereinabove quoted, the Board claims that a lower court did not give effect to the "withdrawal of recognition" and "disestablishment" provisions of its order. This claim is not well founded.

The language objected to by the Board was merely explanatory of the employees' rights under the Act,—*rights which neither the Board, the courts, nor the respondent could destroy or take away.* It established no new rights. It merely safeguarded and protected inherent substantive rights guaranteed the employees under Section 7 of the Act.

In short, all that the lower court did, by inserting the language to which the Board objects, was to advise all interested parties that it was protecting and not withdrawing or taking away any rights which were guaranteed the employees under the Act.[4]

Inasmuch as the lower court, in the instant case, *did* order "disestablishment," and *did* order "withdrawal of recognition," this case is unlike *National Labor Relations Board vs. Newport News Dry Dock & Ship Building Corp.*, No. 20, this Term, which has been argued before this Court and is now pending decision.

In the *Newport News* case, the lower court refused to order either the withdrawal of recognition from or the disestablishment of the union which it had found had been dominated and interfered with by the employer.

In the case at bar the Board is not content with an order requiring disestablishment and withdrawal of recognition. It is here asserting that it is not enough to have the union disestablished and all recognition withdrawn from it so that it will be on the same basis as the other unions. It is here asserting that the disestablished union has become *permanently* disqualified from ever acting as the representative of the employees, for all times and under all conditions, *whether the employees desire to be represented by it or not.*

The Board is, in effect, arrogating to itself the role of an executioner. It claims the right to kill any organization which has been given what the Board deems a "kiss of death" by an employer. It claims that right without regard to the wishes or desires of the employees. It proposes to

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[4] The language added by the lower court, in effect, merely advised the interested parties that the court, although it required the respondent to disestablish and withdraw recognition of the Independent, still recognized the statutory right of the employees to full freedom of choice in the selection or designation of their bargaining agent.

exercise it, even though the infirmity could easily be removed. It would *destroy* rather than *cure*. The "family" (the employees) is not consulted or given any voice in the making of the final decision. Everyone is helpless and at the complete mercy of the all-powerful and omniscient executioner—the National Labor Relations Board.

III.

The Court Did Not Err in Incorporating in Its Order the Language Complained of by the Board.

It may be conceded, *arguendo*, that a prolific cause of dispute between employers and employees was the attempted imposition of employer-controlled labor organizations, or so-called "company unions." The Board devotes a considerable portion of its brief in an attempt to establish and emphasize this point.[5]

Employer domination or control of a union, wherever found, should be eradicated and removed. This should be true whether the union is affiliated or unaffiliated. The National Labor Relations Act was designed to protect the employees from such domination or control whenever or wherever exercised.

Not only was the Act designed to protect the employees from employer domination or control, but the Act especially provides that:

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[5] The Board has repeatedly used the term "company union" in its brief. We assume that said term was used by the Board in the commonly understood sense i. e. a labor organization **dominated and controlled** by an employer. We assume further, that the Board did not intend to apply this term to a labor organization merely because it was limited to the employees of a single employer and unaffiliated with a national labor organization.

"Employees shall have the right to *self-organization,* to *form,* join, or assist labor organizations, to bargain collectively through representatives *of their own choosing,* and to engage in concerted activities, for the purpose of collective bargaining and other mutual aid or protection" (italics supplied).[6]

By Section 7 of the National Labor Relations Act, Congress expressly provided that employees shall not only have the right to join or assist labor organizations, but to *form* and *organize* them as well. Thus the employees were given the right, in the exercise of *their* discretion, to form or join a local unaffiliated union, or join a union affiliated with a national labor organization.

May we respectfully emphasize the fact that the rights vested in employees by Section 7 of the Act are absolute and unconditional; that said rights cannot be taken away from the employees by any act of an *employer* and cannot be taken away by any act of the *Board.*

It is to be noted, that while Section 7 declares the rights of employees, Section 8 of the Act merely enumerates Acts which constitute unfair labor practices on the part of the employer. Section 7 is wholly independent of Section 8. In enforcing Section 8, the Board is given no power to impinge upon, or interfere with, any rights vested in the employees under Section 7 of the Act.

It is pointed out by the Board that the "model" for proper preventive and remedial action was supplied by this Court in *Texas & New Orleans Railway Company vs. Brotherhood of Railway Clerks,* 281 U. S. 548. The Board then goes on to say that the affirmative remedy judicially approved in that case "has received well night universal acceptance" and "was known to and approved by Congress in enacting the National Labor Relations Act."

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[6] Section 7 of the National Labor Relations Act.

We submit that the *lower court,* and not the Board, *has followed that model.*

By that part of the decision of this court in the *Texas & New Orleans* case, which the Board quotes at page 33 of its brief, the inference might be drawn that the court required the Railroad to permanently disestablish the Association. Had the Board completed the quotation, it would have been noted that such was not the case.

In the *Texas & New Orleans* case, this court in commenting on the order of the lower court, which it approved, said:

> "The court directed that, in order to purge themselves of this contempt, the Railroad Company and these officers should completely 'disestablish the Association of Clerical Employees,' *as it was then constituted* as the recognized representative of the clerical employees of the Railroad Company, and should reinstate the Brotherhood as such representative, *until such time as these employees by a secret ballot taken in accordance with the further direction of the court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives*" (italics supplied) (281 U. S. at 557).

We respectfully submit that the *Texas & New Orleans* case certainly does not support the contention that, because an organization has once been supported or controlled by an employer it cannot thereafter be recognized by an employer despite the fact that all taint has been removed and the employees have chosen it as their representative free from dictation or interference of the employer. On the contrary, the *Texas & New Orleans* case recognized the right of the employees to designate any organization they saw fit provided this was done by secret ballot without dictation and interference of the employer.

In support of its contention that it has the power to deprive employees of the right to vote for a "disestablished" union, the Board also relies on *National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.*, 303 U. S. 272; and *National Labor Relations Board vs. Fansteel Metallurgical Corp.*, 306 U. S. 240. None of these cases support this contention.

In the *Pennsylvania Greyhound* case, the employer promoted the organization; urged employees to join; prepared the by-laws; presided over the organization's meetings; selected employee representatives of the organization; had control over any change in the by-laws; and, paid all expenses. Employees paid no dues. No wonder that this court held:

> "There was ample basis for its (the Board's) conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was the appropriate way to give effect to the policy of the Act" (303 U. S. at p. 271).

This court, however, even under those facts, did not hold that the Association could not be selected by the employees free from company interference or coercion after it was purged of company domination, support, or control. On the contrary, it would appear that this court assumed that it could be selected, *after a free election*, for it stated:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union *before an election* by employees under Section 9 (c), even though it had ordered the employer to cease unfair labor practices. But, here respondents, by unfair labor practices, have succeeded in establishing a company union *so organized that it is incapable of functioning as a bargaining representative of employees*" (Italics supplied) (303 U. S. at p. 270).

In the *Pacific Greyhound* case also, *unlike the instant case*, not only did the employer interfere with the employees in their right to choose their labor organization, but the employer also dominated and controlled the organization itself. Yet all that this court held in that case was that, under the facts there involved, "*continued* recognition" (italics supplied) might be "a *continuing* obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing" (italics supplied) (303 U. S. at p. 275).

As we have heretofore pointed out, outside of the evidence to the effect that the respondent in this case had aided and assisted in the organization and formation of the Independent, there is no evidence that respondent had, in any manner or in any wise, controlled, dominated, or interfered with the organization or any of its functions or activities. There is no evidence in this case that respondent imposed its will on its employees or the Independent in respect to the structure of the Independent or the provisions of its articles or by-laws.

On the contrary, it definitely appears that the *structure* of the Independent was the result of the free, independent, and uninfluenced action of its members. The Board has never found, or claimed, that under the Independent's articles and by-laws it did not have the "form and structure adequately to function as a free representative of the employees."[7]

Unlike the situation in the two *Greyhound* cases, it definitely appears here that the Independent was not "so organized that it was incapable of functioning as a bargain-

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[7] See **Cudahy Packing Co. vs. N. L. R. B.** (C. C. A. 8th) 102 F. 2d 745 (pp. 752-753).

ing representative of employees."[8] If the lower court erred at all it erred in ordering the respondent to withdraw recognition from the Independent and to disestablish it prior to an election under Section 9 (c) of the Act. It certainly did not err in not disqualifying the Independent as a candidate of the employees.

In the two *Greyhound* cases, this Court did not either directly or indirectly hold that an order for withdrawal of recognition and disestablishment was tantamount to an execution and the complete elimination of a candidate. Indeed, as we have pointed out, the language of this Court in those cases clearly shows that this Court took it for granted that the disestablished union could still be a candidate at a free election conducted under Section 9 (c) of the Act.

The *Fansteel* case, likewise, instead of supporting the Board's contentions, refutes them and supports the lower court. In the *Fansteel* case, this court carefully pointed out:

> "While respondent presents a strong protest, insisting that Local No. 1 of the Rare Metal Workers was the free choice of the employees after work was resumed, we cannot say that there is not substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provision of Section 8 (2), and we think that the order of the Board in this respect

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[8] As this court stated in the **Pennsylvania Greyhound** case: "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employes under Section 9 (c), even though it had ordered the employer to cease unfair labor practices. But, here respondents, by unfair labor practices, have succeeded in establishing a company union **so organized that it is incapable of functioning as a bargaining representative of employees**" (bold supplied) (303 U. S. at p. 270).

(requiring withdrawal of recognition of Rare Meta' Workers) should be sustained. *Whether Rare Metal Workers of America, Lodge No. 1, or any other organization, is the choice of the majority of the employees in the proper unit can be determined by proceedings open to the Board"* (italics supplied) (306 U. S. at p. .....) (83 L. Ed. at p. 478).

Thus, this Court, in the *Fansteel* case, definitely held that even though the employer was required to withdraw recognition of Rare Metal Workers because of the unfair labor practices of the employer, *the Rare Metal Workers could be a candidate of the employees at an election held under Section 9 (c) of the Act.* The lower court, by its order, merely made a similar provision regarding the Independent. In that respect it literally adopted the determination of this Court in the *Fansteel* case.

A.

The Board Had No Power Permanently to Disqualify the Independent as the Employees' Candidate.

The Board contends that it has the power "to order the permanent disestablishment of an employer dominated union" (Board's Brief, pp. 38-46). It argues that such organization, whether or not it has been purged of any infirmity, should be permanently barred from competing "for membership of the employees and for status as their bargaining representative" (Board's Brief, p. 41).

The Board asserts that it is supported in its position by the decisions of this Court in the *Greyhound* cases,[9] and the *Fansteel* case[10] (Board's Brief pp. 38, 39).

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[9] **N. L. R. B. vs. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261; N. L. R. B. vs. Pacific Greyhound Lines, Inc., 303 U. S. 272.**

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[10] **National Labor Relations Board vs. Fansteel Metallurgical Corp., 306 U. S. 240.**

We have heretofore commented on said cases. As we have already pointed out, those cases went no further than to hold that employer recognition of a "company dominated" union should be *suspended* pending the holding of a free election under Section 9 (c) of the Act, so that the employees would be enabled to exercise their full freedom of choice at the election.

As we have also heretofore pointed out, it was assumed in the *Greyhound* cases, and *definitely stated* in the *Fansteel* case that the employees could designate the "disestablished" union at such election, if they so desired.

The case of *Consolidated Edison Co. vs. N. L. R. B.*, 305 U. S. 197, cited by the Board (Board's Brief p. 39) involved the consideration of the power of the Board to invalidate a contract between an employer and a labor union. It, in not even the remotest degree, dealt with none of the questions here involved.

The Board attempts to support its contention, that it has the power to "permanently" disestablish, on three grounds, viz:

1. The attitude of the employees toward a union which has been employer dominated will probably never be wholly free from employer influence.
2. Continued domination of a union by an employer who formerly dominated it would be easy, yet difficult of detection.
3. Any possible restriction on employee choice resulting from permanent disestablishment is slight compared with the advantages of the remedy.

We will now take up and analyze these three points *seriatim*.

I. The employees would probably be influenced against the Independent, because of the employer's previous activities, rather than in favor of it. In any event what their attitude might be in a free election is no concern of the Board.

The Board states that the "court below * * * imposed conditions upon the disestablishment remedy which destroy its efficacy" (Board's Brief, p. 39). As we have pointed out, the lower court required the respondent to completely disestablish the Independent. In that respect the lower court imposed no conditions. Under the lower court's disestablishment order the respondent was forever precluded from recognizing the Independent unless the *employees*, by their own independent action through the instrumentality of a free election, demanded such recognition.

The lower court thereby followed the *Greyhound* and *Fansteel* cases and did not, as claimed by the Board, adopt the "premise which was advanced against the disestablishment provisions of the Board's orders in the *Greyhound* and *Fansteel* cases" (Board's Brief p. 40).

At page 40 of its brief, the Board attempts to convey the impression that the Independent was "dominated and supported" by the employer "throughout its history." We cannot leave that statement unchallenged. It has no support in the record. Excepting insofar as the respondent may have aided the Independent in its inception and promotion, as found, there is no evidence that respondent in any way dominated or supported the Independent. Likewise, there is no evidence that the respondent had anything whatsoever to do with the structure of the Independent or its administration or actual functioning.

Not only did the respondent in no manner or in any wise interfere with the functioning or administration of the Independent, but upon request of the Board's Regional Director, N. S. Clark, by letter dated June 8, 1937, it had no further dealings with the Independent since that date (R. 1043-1046, 1071) (R. 89).

The Board contends that the consequence of a violation of Section 8 (2) of the Act is that the affected organization "inevitably stands in the minds of the employees as the candidate of the employer" and that this "precludes it from a place on the ballot * * * and requires its permanent disestablishment" (Board's Brief p. 40).

We respectfully submit that the mere fact that employees may be cognizant of the fact that an employer favors a certain organization should not deprive the employees, *if they so desire,* to select that organization. That fact should not deprive the employees of the right to choose any organization they please. Under Section 7 of the Act the employees are given full freedom of choice, *and this includes the right to choose unwisely.* This moreover, includes the right to choose an organization *favored* by the employer, as well as one *opposed* by him.

Certainly Congress never intended to circumscribe or limit the right of employees to use *their own judgment* in selecting *their* bargaining agent. The Board seems to think that employees are imbeciles under legal disability who have become its wards; and that, as their "guardian," the Board must substitute *its* judgment and control their discretion.

If the Board is to substitute *its* judgment for that of the employees and deprive the employees of the right to choose whomsoever they see fit, Section 7 has become a mere mockery. *Interference by the Board* has then been substituted for *interference by the employer.* Freedom of choice by the employees has become a sham and an empty phrase.

We believe that this Court will be as shocked as we were upon reading the Board's statement that "The Board should not be required to permit company sponsored labor organizations, which were a prime object against which the Act was directed, to resume operations upon the Board's guess that they will not prove harmful" (Board's Brief p. 43). This statement is proof positive that the Board does consider employees as mere *wards* and that it has been appointed their custodian and guardian. This statement, moreover, naively assumes that labor organizations can function only by its *favor,* instead of by *right.* What a travesty "freedom of choice" would be, if the Board's contentions were to be given the stamp of approval.

The Board states that if the Independent "is permitted to continue to compete for membership of the employees and for their status as their bargaining representative, it may be *expected* to retain the same structure, policies, and officials, the choice of which * * * have been decisively influenced by the employer and shaped with an eye to his approval" (italics supplied) (Board's Brief pp. 41-42). This statement is not predicated upon the record. It assumes a fact not established, viz, that the structure, policies and officials were chosen by virtue of the respondent's influence.

Nevertheless, we respectfully submit that the employees certainly should be given the right to choose *their own* structure, policies, and officials. If any of these are bad, it certainly must be assumed that the same will be considered and weighed *by the employees* at the election *before they cast their ballots.* The employees have the power to change the structure, policies, and officials of the organization. As long as that power is not interfered with by the employer, if the employees do not see fit to make any changes and are satisfied with the structure, policies, and officers of the organization, what concern is it of the Board?

It must be remembered that the employees were, by the order of the court, under the continuing protection of a permanent injunction which required the respondent to cease and desist from in any way interfering with or dominating the Independent and contributing any support to it.[11] This fact is given no consideration by the Board.

If the Board's argument is sound it must follow that, if an employer is assumed to favor an unaffiliated union against an affiliated organization, the employees may *never* thereafter vote for an unaffiliated union. Similarly, if an employer, is assumed to favor a C. I. O. union over an A. F. of L. union, the employees may *never* thereafter vote for a C. I. O. union, or *vice versa*. If the Board's arguments are sound the employer can give any organization, which is a candidate for representation rights, the "kiss of death." *An employer secretly favoring one candidate could eliminate the other by making it known that it favors the organization which it secretly opposes.* Such is the result of the Board's "logic."

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[11] The "cease and desist" provisions of the lower court's order are as follows:

"IT IS HEREBY ORDERED that the Falk Corporation, respondent herein, cease and desist from (a) dominating or interfering with the formation or administration of the Independent Union of Falk Employees or of any other labor organization of its employees and from contributing financial or other support to said Independent Union or any other labor organization; (b) from interfering with, intimidating, restraining, coercing, or endeavoring to coerce, its employees in their right to form, join or assist any labor organization or in exercising their right to freely and collectively bargain through representatives of their own choosing, or to freely engage in concerted activities for the purpose of collective bargaining (R. p. 1213).

If the employer has given the "kiss of death" to the Independent, the Board argues that the employees nevertheless are free to form a new unaffiliated union if they desire to be represented by an unaffiliated organization (Board's Brief p. 45). By this statement the Board has disregarded its own argument. If a new unaffiliated organization were a candidate, *the employees would be no less cognizant of the fact that it was favored by the respondent over an affiliated union.* They would, more likely than not, adopt the same structure, policies, and officers for this new organization. Would they be deprived of that right?

The Board states that "denial to the Board of power to order permanent disestablishment would impose upon it the virtually impossible task of determining when the interference had ceased to have any effect" (Board's Brief p. 42). This statement is rather strange in view of the fact that the Board stated in its own decision: "We shall direct that such election be held upon our further order *after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order*" (R. 1179) (italics supplied).

Respondent in effect disestablished the Independent as early as June, 1937 in deference to the request of the regional director, N. S. Clark (R. 89, 1043-1046, 1071). It will be conceded by the Board that the respondent, in compliance with the lower court's order, posted the required notices and has done everything required of it under the order.[12]

As we have heretofore pointed out, the Board has no authority to substitute its judgment for that of the employees. The power to enforce Section 8 of the Act cannot be exercised to take away the rights vested in the employees under Section 7 of the Act. It must always be assumed, which is the only assumption which can be made,

[12] The notices were posted beginning August 14, 1939.

that the election under Section 9 (c) will be a fair and *free* election and that the respondent will comply with the terms of the injunctional order.

2. The Board cannot assume that respondent will violate the injunctional order. In any event the Board cannot eliminate the Independent as the employees' candidate on the ground that violation of the injunctional order would be easy, and difficult to detect.

At pages 43-44 of its brief, the Board asserts that violation of the cease and desist order is "markedly facilitated" if the old organization is permitted to continue.

The Board states in this connection that an employer could more easily effect and conceal control of the old organization, "which was designed and officered in accordance with their wishes," than he could a new organization which might be created by the employees.

There is no evidence in the record that the Independent "was designed and officered in accordance with" the respondent's wishes. On the contrary, the evidence shows that the Independent was designed and officered in accordance with the wishes of the employees themselves.

As we have heretofore pointed out, there is no support in the record for an assumption that if a *new* organization were formed it would not take the same form as the old organization, and would not be officered by the same individuals. The change, if any, would be one of form rather than substance.

In arguing that the old organization should not be permitted to continue because the cease and desist order might be violated and such violation might be difficult of detection, the Board is again assuming the role of guardian to the employees. As such guardian, it is asserting the authority to deprive the employees of their right of freedom of choice. It justifies the exercise of that authority, not on the ground

that the employees will not have full freedom of choice at an election conducted under Section 9 (c), but on the ground that the beneficiaries of said choice *may subsequently be interfered with by the employer.*

If the Board is given the authority to strike down any organization which is the free choice of the employees merely because that organization *might,* at some later date, be interfered with by an employer, in violation of Section 8 (2) of the Act, Section 7 of the Act is merely empty verbiage. Section 7 should have been rephrased to provide that employees shall have the right to form or join only such a labor organization which shall have been approved by the Board.

The Board's argument is in substance the same as the argument that because a horse might be stolen, the horse should be shot. The Board argues that just because the Independent *might* be interfered with if it is chosen at the election, it should be *destroyed.*

Although we have pondered hard and long on the Board's contention that control of a new organization could not be concealed as readily as control of the old organization, we are just unable to comprehend the same. We can see no merit in this contention whatsoever. In any event, this affords the Board no right to deprive the employees of any of the rights guaranteed them under Section 7 of the Act.

3. Answer to Board's contention that "any possible restriction on employees' choice resulting from permanent disestablishment is slight compared with the advantages of the remedy."

The Board, at page 44 of its brief, admits that "employees who may desire to be represented by the Independent and who may have remained uninfluenced by the unfair labor practices, or who may assert that they have cast

off such influence during the period of nonrecognition, are denied the Independent." It goes on to say that the "possible restriction on an absolutely free choice by" the employees is not a serious one, and that those employees who desired an unaffiliated organization "are free to form a new union." What authority the Board has to impose any restrictions whatsoever, whether the restrictions are serious or not, it does not say. We respectfully submit that the National Labor Relations Act does not give the Board the power to restrict the employees in the full freedom of choice guaranteed them by Section 7, in any manner or in any degree whatsoever.

While the Board says that "those employees who desire an unaffiliated organization are free to form a new union," it will be noted that *the Board excluded any such possible candidate from the ballot.*[13]

The Board again makes much of the point that if the employees should be permitted to vote for the Independent, some of the employees will be influenced by the knowldge that the Independent "is the employer's candidate." We have heretofore dealt with this contention (*supra*, pp. 49-54).

The Board infers that by reason of such knowledge, the employees will be encouraged to vote for the Independent. Certainly, employees have the right to cast their ballot in favor of a candidate whom they believe is favored by the employer so long as the ballots are cast by the employees of their own free will without any intimidation, coercion, or interference by the employer. Moreover, if the employees

[13] In the direction of the election, the Board ordered that the employees should have the right to vote only for the C. I. O. as the plant representative (exclusive of the power house employees), or for the C. I. O. or A. F. of L. to represent the power house employees, or neither. **The Board made no provision enabling the employees to advance and vote for any other candidate** (R. 1181-1182) (bold supplied).

know that a certain candidate is favored by an employer, it is certainly better for the employees to be apprised of that fact. It is just as logical to assume that the knowledge, that a candidate is favored by an employer, would influence the employees to vote against such candidate than it is to assume that the employees would be encouraged to vote *for* the candidate.

The freedom of choice of the employees will be given full play. *Their* selection will be based upon *their* judgment of the situation. In the exercise of that judgment they will be protected by the injunctional order against the respondent. Thus, all the employees will be given an absolute freedom of choice without restriction or limitation by either the Board or the respondent. This procedure is the only procedure which will assure the employees the rights guaranteed them by Section 7 of the Act.

B.

The Provisions of the Order of the Lower Court Objected to by the Board are in Keeping with the Requirements of the National Labor Relations Act.

At pages 46-50 of its brief, the Board argues that "even if the Board cannot order permanent disestablishment, the conditions imposed by the court are unreasonable." In support thereof, the Board makes two contentions, viz:

1. That "the court could not properly assume that, by the time of the election, the Independent could appear on the ballot without unfairly influencing the employees' choice."
2. That "the conditional disestablishment ordered by the court cannot serve to recreate freedom of choice by respondent's employees."

We shall now consider these contentions *seriatim:*

1. The lower court properly assumed that the Independent could appear on the ballot.

We have heretofore shown that under the *Texas & New Orleans Greyhound,* and *Fansteel* cases, the lower court properly assumed that the Independent could appear on the ballot (*supra,* pp. 42-48).

What we have already stated refutes the Board's contention that the lower court could not properly assume that the Independent could appear on the ballot "without unfairly influencing the employees' choice."

We have also heretofore shown that there was no basis for the contention by the Board that employer interference left effects which would unfairly influence an election (*supra,* pp. 49-54). It is our position that there is no basis for any assumption that because of employer interferenece there could be no free election within the contemplation of the Act.

In the instant case, as we have heretofore shown, the respondent in effect disestablished the Independent as early as June 1937; has posted the notices required by the lower court in its injunctional order; and, has complied therewith since the date of its issuance. Surely, ample time has passed to enable the employees of the respondent to take such steps as they saw fit to avail themselves of, the rights vested in them under Section 7 of the Act.

The Board states "If we are wrong in thinking that a fair election * * * could never be held among respondent's employees, it is, at least, clear that a considerable period of time would have to pass before such an election would be possible" (Board's Brief, page 48). May we state in reply that more than two years have elapsed during which the Independent has not been recognized by the respondent, *by its own voluntary action.* The situation here presented certainly shows nothing which would prevent the Board from

conducting a fair and free election *without any further delay.*

The Board also states, "It certainly was not an abuse of discretion for the Board to determine that the employees should not indefinitely be denied all opportunity to select a representative—with the consequent postponement of the collective bargaining which the Act fosters—until a determination can be made, if it ever can, that respondent's sponsorship of the Independent will not influence an election in which that organization participates." May we state in reply that, *but for the order of the lower court,* **the Board itself would have indefinitely denied to the employees the opportunity to select a representative which would have postponed collective bargaining.**

By the order of the lower court, it was intended to assure the employees the right to vote for any candidate seeking their favor, so that at the coming election the employees would be given their full freedom of choice and would be in a position to select their bargaining agent.

On the other hand, the Board in its "direction of election," instead of affording the employees full freedom of choice, as between any candidate advanced by them, *did not in effect provide for any election at all.* Under its "direction of election," the Board provided that the employees should be given the opportunity to vote either for the C. I. O. or against it. (In the case of the power house employees, for the C. I. O. or the A. F. of L., or for neither.) (R. 1181-1182).

Let us assume that an election were conducted by the Board pursuant to its "direction of election." Let us further assume that at this election, because the employees are given no choice of candidates, the employees refused to designate the C. I. O. as their bargaining agent, and it does not receive a majority of the votes. This result, we submit, is not only

possible but highly probable. Would the Board then contend that its "election" has given the employees a speedy "opportunity to select a representative," and would the Board then contend that the "election" has prevented a "postponement of collective bargaining?"

We respectfully submit that an "election" held in the manner and form provided for in the Board's "direction of election" would indefinitely postpone "the collective bargaining which the Act fosters," and that by virtue of such "election" the employees would "indefinitely be denied all opportunity to select a representative."

To avoid such postponement of their right of collective bargaining, it might well be argued that *the Board is in effect coercing the employees to select the C. I. O. as their bargaining representative, or to indefinitely remain without any bargaining agent.*

2. The disestablishment ordered by the court was not a "conditional disestablishment." It put the Independent on the same plane as any other candidate.

At pages 48-50 of its brief, the Board argues that "the conditional disestablishment ordered by the court cannot serve to recreate freedom of choice by respondent's employees." As we pointed out earlier in this brief *(supra,* pp. 37-41), the disestablishment order of the court was absolute and unconditional,—as absolute and unconditional as the disestablishment orders in the *Greyhound* and *Fansteel* cases.

The only purpose of a disestablishment order is to remove from the disestablished organization any benefits which it would otherwise enjoy by reason of employer recognition, and put it on the same plane and on the same basis as any other candidate seeking the favor of the employees.

This result was accomplished by the order of the lower court requiring the respondent to withdraw recognition of the Independent and disestablish further dealings with it.

The disestablishment order of the lower court did not provide for a "fragmentary disestablishment," as contended by the Board, and was in no sense "self contradictory." The "cease and desist" provisions in the injunctional order assured the employees that they would be protected from any domination, interference, or coercion by the respondent in the exercise of their freedom of choice, and the disestablishment order effectually removed any advantages, as far as recognition was concerned, which were not enjoyed by other candidates seeking the favor of the employees.

The Board goes on to say that "An effort to overcome the effects of employer domination of a labor organization can succeed only if it is brought home to the employees that, because of the employer's sponsorship, the organization is not a fit medium for collective bargaining. * * * The order of the court cannot transmit that message" (Board's Brief p. 49). Surely the "cease and desist" provisions of the order of the lower court, its disestablishment order, and its order requiring the posting of notices stating, among other things, that "the respondent will and does withdraw recognition," goes as far as necessary to adequately inform the employees of the true situation. Surely judicial and administrative process should not be used for the purpose of disseminating campaign material in favor of one candidate or against another.

As we have heretofore pointed out, it should be left to the employees themselves to determine whether or not the Independent was, or had become, "a fit medium for collective bargaining." They should be given the opportunity to express their opinion in a free election conducted under Sec-

tion 9 (c) of the Act. As we have heretofore pointed out, employees will be given the opportunity at such election to refuse to select the Independent because they conclude that the activities of the employer have demonstrated that it is not "a fit medium for collective bargaining."

It is just as logical to assume that, in the exercise of their freedom of choice at such free election, the employees will be influenced *against the Independent* by reason of the previous activities of the respondent, as it is to assume that they will be influenced *in favor of the Independent*. In any event, the "influence" of which the Board speaks is not such as "interferes" with the freedom of choice of employees within the meaning of the Act.

Finally, even if it is assumed that employees may desire to select a candidate which the employees have reason to believe is favored by the employer, shouldn't the employees be given that right? After all, it goes without saying that the primary interest of the employees is to get the highest wages and the best working conditions which it is possible to obtain. If they believe that they are more apt to accomplish this by bargaining through a representative which they have reason to believe is favored by the employer, surely they should have the right to act on such belief. Who can say that such action, based upon such belief, is not in the best interests of the employees?

IV.

The Board Should be Estopped From Attacking the Lower Court's Order Inasmuch as it at no Time Asked for a Stay of the Court's Order and the Respondent has Already Acted in Compliance Therewith.

The Board's attack of the lower court's order presents a rather anomalous situation insofar as the respondent is concerned. The decree of the lower court was entered on July 13, 1939. It embodied a permanent injunctional order which not only directed it to cease and desist from the acts thereiñ enumerated and withdraw recognition from the Independent and disestablish it, but also required the respondent to post a notice in the manner and form stated in the order.

It will be conceded by the Board that the respondent has complied therewith in every respect; that the notice was posted by the respondent as required by said order; and, that the Regional Director was duly notified of such compliance as required by the court's injunctional order *(supra* pp. 18-21).

Thus, the respondent has already complied with the injunctional order which is now attacked by the Board. In particular, it has posted the notice as required by said order. The Board now seeks a revision of the lower court's order which, if granted, would require the respondent to post notices in a different form embodying different language.

Despite the fact that the Board knew that the respondent has been subject to an injunctional order of the lower court since July 13, 1939, and that respondent has been required to comply therewith, and that respondent is still under such injunctional order, the Board has permitted said injunctional order to remain in full force and effect and has re-

quired compliance therewith by the respondent. No stay of the injunctional order was ever requested by the Board or granted by the court.

We respectfully submit that by virtue of these facts, the respondent should in no event be required to further confuse or disrupt its labor relations through the posting of any further notices. If the Board was not satisfied with the form of the notice ordered by the lower court, it should not have required the respondent to post that notice and now attempt to require the respondent to undo that act and again post notices.

CONCLUSION.

It is respectfully submitted that the decision and order of the court below was in all respects in conformity with the requirements of the National Labor Relations Act as construed and followed by this Court, and that said decision and order in all respects be sustained and affirmed.

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APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158 *et seq.*) are as follows:

SEC. 1. • • • • • • • • • • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to Section 6.(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

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(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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[1] So in original.

SEC. 10. * * * * * * * * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

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(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or re-

straining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).